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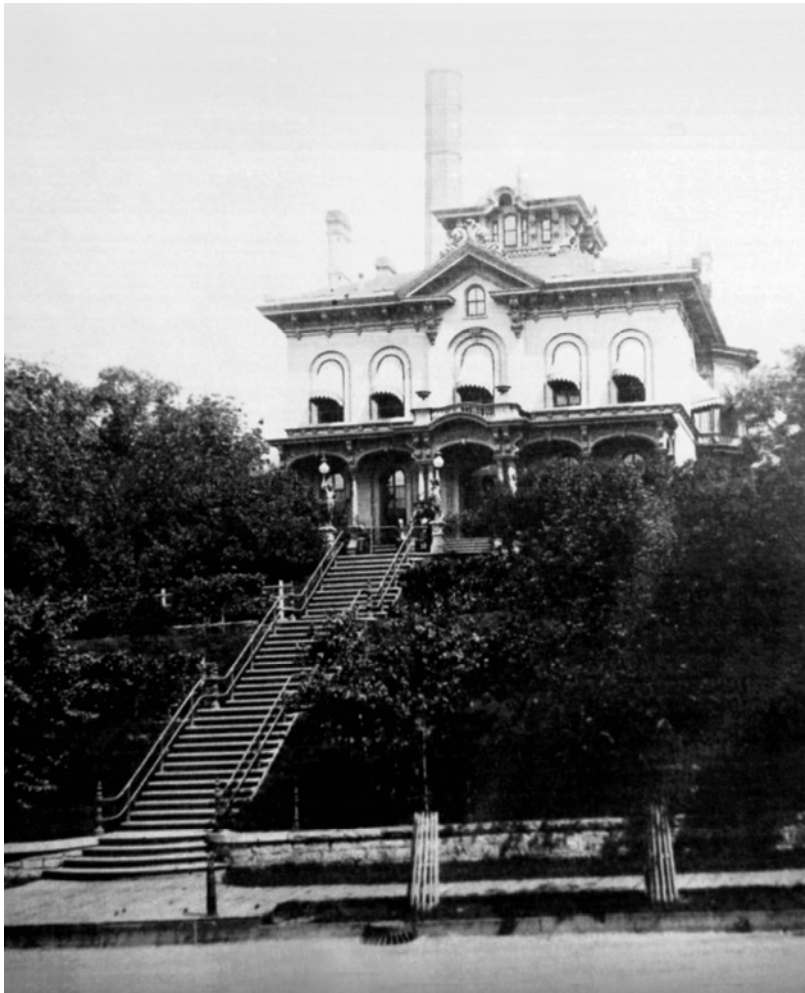


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Frontispiece. The Melms mansion (as seen in this undated nineteenth-century photograph) faced south on Virginia Street in Milwaukee, slightly more than a block west of modern-day 6th Street. Courtesy of the Milwaukee County Historical Society.

# **MELMS V. PABST BREWING CO. AND THE DOCTRINE OF WASTE IN AMERICAN PROPERTY LAW**

THOMAS W. MERRILL\*

*Melms v. Pabst Brewing Co.*<sup>1</sup> may be the most important decision ever rendered by an American court concerning the law of waste.<sup>2</sup> Unless your specialty is property law, that might not be enough to stir your interest. The doctrine of waste, after all, does not loom very large in public consciousness these days.

Nevertheless, waste has held a peculiar fascination for property theorists.<sup>3</sup> The reason, I think, is that it touches directly on an important line of division in how we think about property. Does property exist primarily to protect the subjective expectations that particular owners have in particular things? Or is the central function of property to maximize the value that society ascribes to particular things? To put it somewhat dramatically, but I think not inaccurately: Is property an individual right or a social institution?

*Melms* was decided by the Wisconsin Supreme Court in 1899. It involved a mansion on the south side of Milwaukee that was demolished in the early 1890s by Captain Frederick Pabst, the brewer of Pabst Brewing Company fame. Pabst owned the surrounding property, and thought he owned the mansion, too. It turned out that Pabst did not

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\* Charles Evans Hughes Professor of Law, Columbia Law School. This is an expanded version of Professor Merrill's Robert F. Boden Lecture, delivered at Marquette University Law School in September 2010. A comment by Richard A. Posner follows this article. Versions of the article and comment (abridged but with some additional images) were published in the Summer 2011 *Marquette Lawyer*. The author wishes to thank Philip C. Babler, Andrew B. Davis, and Thomas G. Kamenick for exceptional research assistance.

1. 104 Wis. 7, 79 N.W. 738 (1899).

2. See WILLIAM B. STOEBOCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 4.2 (3d ed. 2000) (citing *Melms* as “[t]he leading American case” on ameliorative waste and referring to it extensively as a model for how waste disputes should be resolved by courts).

3. For a sampling of views, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 54–58 (1977); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.11 (8th ed. 2011); JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 44–66 (2010); John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209 (2007); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).

own the mansion in fee simple. Rather, according to another decision of the Wisconsin Supreme Court—handed down four years after the mansion was destroyed<sup>4</sup>—he held it only for the life of an elderly widow named Marie Melms. After Marie’s death, her children would have inherited the mansion, if it still stood. The Melms children sued Pabst, claiming he had committed waste by destroying the home that was rightfully theirs.

The Wisconsin Supreme Court’s 1899 decision rejected the claim that Pabst had committed waste in leveling the mansion.<sup>5</sup> The decision contained path-breaking language seeming to say that waste disputes should be resolved by comparing economic values. In other words, the court appeared to adopt the view that property is a social institution, not an individual right. My central objective here is to ask whether this is the correct understanding of the case, or of the lessons that it holds for property law more generally.

## I.

Waste is one of the ancient writs of the common law, dating back to the twelfth century.<sup>6</sup> It applies when two or more persons have interests in property, but at least one of them is not in possession. A lease is the most familiar example; a life estate followed by a remainder would be another. For convenience, I will generally refer to persons in possession as “tenants,” and those out of possession as “absent owners,” with the understanding that these terms cover a variety of situations with more technical terminology.

Waste is an action by an absent owner to prevent the tenant from injuring the absent owner’s interest in property. The action for waste has always been preventive in nature. The Statute of Gloucester, enacted in 1278, provided that the absent owner could recover treble damages against the tenant for committing waste.<sup>7</sup> This was obviously designed to deter tenants from harming the interests of absent owners. Many states today still have statutes providing for multiple damages for waste.<sup>8</sup> The chancellor’s court of equity, again quite early on, issued

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4. *Melms v. Pabst Brewing Co.*, 93 Wis. 140, 148, 66 N.W. 244, 246 (1896).

5. *Melms*, 104 Wis. at 15–16, 79 N.W. at 741.

6. 8 POWELL ON REAL PROPERTY § 56.02 (Michael Allan Wolf ed., 2011). For an overview of waste law, see STOEBUCK & WHITMAN, *supra* note 2, §§ 4.1–4.5.

7. 6 Edw. 1, c. 5 (1278) (Eng.).

8. See, e.g., MICH. COMP. LAWS ANN. § 600.2919(2)(a) (West 2010) (“Any . . . life tenant . . . who commits or suffers any waste . . . is liable for double the amount of actual damages.”); CAL. CIV. PROC. CODE § 732 (West 1980) (“If a guardian, conservator, tenant for life or years, joint tenant, or tenant in common of real property, commit[s] waste thereon, any

injunctions against waste, also reflecting its preventive nature.<sup>9</sup>

Waste comes in three varieties: permissive, voluntary, and ameliorative.<sup>10</sup> Permissive waste is a form of nonfeasance.<sup>11</sup> Suppose someone dies, leaving the tenant the house for life and then to the absent owner. While the tenant is in possession, the roof develops a leak, but the tenant does nothing to correct the situation, causing the interior to suffer water damage. Here, the tenant's nonfeasance has harmed the absent owner's interest in the house. The absent owner has an action against the tenant for waste.

Voluntary waste, the second variety, is a form of misfeasance.<sup>12</sup> A simple example: the absent owner leases a farm with a cherry orchard to the tenant. The tenant cuts down the cherry trees and sells them for wood. Here the tenant's misfeasance has damaged the interest of the absent owner. The absent owner has an action for waste against the tenant.

The third variety, called ameliorative waste,<sup>13</sup> is the least common but by far the most interesting. Suppose that the absent owner leases a warehouse to the tenant for twenty years. Several years on, the tenant wants to remodel the warehouse into a trendy restaurant. This clearly represents a fundamental change in the property. But, the tenant argues, with supporting evidence from real-estate appraisers, the property would be worth much more, in market-value terms, as a restaurant than as a warehouse. Should the absent owner be allowed to enjoin construction of the restaurant, or recover multiple damages against the tenant for waste, if the tenant remodels? Or should we regard such market-value-enhancing changes as not being waste at all?

*Melms* is a stark example of this third variety of waste. Although the life tenant, Pabst, demolished the mansion, the Wisconsin Supreme Court held that he was not guilty of waste.<sup>14</sup> The court described how circumstances in the neighborhood had changed since the mansion was

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person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.”).

9. See 7 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 278–79 (1926).

10. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES 603–04 (2007).

11. *Id.*

12. *Id.* Voluntary waste is also sometimes called “affirmative waste.”

13. John Henry Merryman, *Waste*, in 5 AMERICAN LAW OF PROPERTY § 20.11 n.1 (A. James Casner ed., 1952) (“The various terms ‘meliorating,’ ‘ameliorating,’ ‘meliorative,’ and ‘ameliorative’ are all used to describe the same doctrine. It is not contended that one is preferable to the others. The matter seems to be largely one of taste.”).

14. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 15–16, 79 N.W. 738, 741 (1899).

built. The surrounding land had been graded down, leaving the mansion standing on an isolated knoll.<sup>15</sup> What was once a residential neighborhood had become an industrial district.<sup>16</sup> Because of these changes, the court said, the property was largely worthless as a residence.<sup>17</sup> It was worth much more, in economic terms, with the mansion razed and the land graded down to the level of the surrounding property so that it could be used for industrial purposes.<sup>18</sup>

*Melms* proved to be a milestone in a transformation in the law of waste that took place in the twentieth century. Before *Melms*, all courts would have regarded the deliberate destruction of a house to be waste. Indeed, any *material alteration* of property by someone temporarily in possession was regarded as waste.<sup>19</sup> The Wisconsin Supreme Court acknowledged that this was the established rule.<sup>20</sup>

After *Melms*, the old rule began to break down.<sup>21</sup> Initially, other states followed *Melms* in considering changed circumstances.<sup>22</sup> Later,

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15. *Id.* at 8, 79 N.W. at 738.

16. *Id.*

17. *Id.*

18. *Id.*

19. Courts more commonly referred to the idea that the tenant was prohibited from performing any act that would injure or prejudice “the inheritance.” See Merryman, *supra* note 13, § 20.11 n.4 (“[A]ny alteration of the premises which is injurious to the inheritance is waste, even though it increases the value of the land.”). Although this was less precise than “any material alteration,” for my purposes the different possible connotations can be ignored, since neither formulation embraced the modern, economics-focused conception of waste of which *Melms* is a precursor. For other cases employing the “material alteration” standard, see, e.g., *Parkman’s Adm’r v. Aicardi & Tool*, 34 Ala. 393, 395–96 (1859) (“It is an old principle of the common law, that a tenant is guilty of waste, if he materially changes the nature and character of the building leased.”); *Turman v. Safeway Stores, Inc.*, 317 P.2d 302, 304 (Mont. 1957) (“[A]ny material alteration or change in the nature and character of a building on the leased premises, even though it enhances the value of the property and is beneficial to the reversion, constitutes waste.”) (internal quotation marks omitted); *Hayman v. Rownd*, 118 N.W. 328, 329 (Neb. 1908) (“Waste is an improper destruction or material alteration or deterioration of the freehold . . .”) (internal quotation marks omitted); *Winship v. Pitts*, 3 Paige Ch. 259, 262 (N.Y. Ch. 1832) (tenant has “no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible” to restore it at the end of the term).

20. *Melms*, 104 Wis. at 10, 79 N.W. at 739 (citing *Brock v. Dole*, 66 Wis. 142, 28 N.W. 334 (1886), and *Bandlow v. Thieme*, 53 Wis. 57, 9 N.W. 920 (1881), as previous cases that held that any material alteration of a property would constitute waste).

21. See *infra* notes 127–35 and accompanying text.

22. See, e.g., *Chapman v. Cooney*, 57 A. 928, 929 (R.I. 1904) (stating that the court should look to the “particular facts” of the case and apply the law “with reasonable regard to the circumstances”); *Hamburger & Dreyling v. Settegast*, 131 S.W. 639, 640–41 (Tex. Civ. App. 1910) (endorsing the *Melms* view that changed circumstances are relevant, but finding

the traditional rule was replaced in many states by a multifactor standard.<sup>23</sup> The standard is expressed differently, but typically it looks to factors such as what a normal owner would do with the property<sup>24</sup> and whether the tenant's actions had increased or decreased the economic value of the property.<sup>25</sup> In practice, economic value tends to dominate everything else. If the economic value goes up, this confirms what a normal owner would do and where the neighborhood is heading. If the value goes down, the opposite inferences are drawn.

The conventional rule of waste—that the tenant can make no material change in the thing without the permanent owner's permission—is consistent with the view of property as an individual right. The purpose of property law is to protect owned things from interference by others, whether by trespass or nuisance, fraud or theft. Property promotes autonomy, security, the ability to make long-term plans, the right to be different. If I temporarily transfer possession of some thing to someone else, through a lease or a life estate, I am entitled to receive the same thing back. This protects my subjective expectations about the thing—my plans for its use in the future—without regard to whether these expectations or plans make sense from anyone else's perspective.

The newer view of waste, reflected in the Wisconsin Supreme Court's decision in *Melms*, is consistent with the view of property as a social institution. Temporary transfers of possession create a potential conflict of interest between the tenant and the absent owner. Such conflicts should not be resolved by insisting that the views and aspirations of the absent owner always prevail. We should instead ask whose views are more congruent with the interests of society. The answer will depend on the circumstances of each case. What we need is

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no changed circumstances presented).

23. See Merryman, *supra* note 13, § 20.11. For more-recent examples, see *Sprucewood Inv. Corp. v. Alaska Hous. Fin. Corp.*, 33 P.3d 1156, 1165 (Alaska 2001) ("Waste occurs when the owner of a possessory estate engages in unreasonable conduct that results in physical damage to the [property] and substantial diminution in the value of estates owned by others in the same [property].") (internal quotation marks omitted); *Crewe Corp. v. Feiler*, 146 A.2d 458, 463 (N.J. 1958) ("The element of increased value can be but one of the many factors, having its greatest influence in long-term arrangements.").

24. See, e.g., *Wingard v. Lee*, 336 S.E.2d 498, 500 (S.C. Ct. App. 1985) (listing, among other factors to be considered, "whether the use is reasonable in the circumstances").

25. See, e.g., *Zywiczynski v. Zywiczynski*, 80 N.E.2d 807, 809 (Ohio Ct. App. 1947) (stating that the tenant may not do "those things which are not necessary to the full enjoyment of the particular estate, and which have the effect permanently to diminish the value of the future estate").

a flexible standard that allows courts to take into account a variety of factors, including, perhaps most importantly, economic value, in order to resolve these disputes in the way that is best for society.

The same fundamental question—whether property is an individual right or social institution—arises throughout property law. Consider the law of nuisance. When property is threatened by pollution, are owners presumptively entitled to an injunction, allowing them to insist on shutting the polluting factory down? Or must they be content with an award of damages, leaving it up to the factory to decide whether to stop polluting or to pollute and pay—whichever creates the greatest wealth for society?<sup>26</sup> Similarly, consider the law of eminent domain. Should the government be allowed to condemn property in return for payment of just compensation only in situations of strict necessity? Or can the government use eminent domain for any project that promises to make the social pie larger, generating more jobs and tax revenue than the compensation that the government must pay to the owners whose property is taken?<sup>27</sup>

Ameliorative waste, the issue in *Melms*, presents the same fundamental question, yet in a simple context, typically involving only two parties. We can regard it as a bellwether for assessing our understanding of the basic purposes of property law.

## II.

It is time to take a closer look at *Melms*. The roots of the dispute lie in the untimely death of Charles T. Melms, generally known as “C. T.” In 1843 at the age of 24, Melms immigrated to the United States from Prussia and settled in Milwaukee.<sup>28</sup> He married into a brewing family, becoming a partner with his father-in-law, Franz Neukirch.<sup>29</sup> Around 1854, Melms and Neukirch purchased land along Virginia Street, in the Menomonee Valley (so named after the local river) on the near south side of Milwaukee. There they developed a state-of-the-art brewery complex, called the Menomonee Brewery.<sup>30</sup> By 1860, it was one of the

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26. The classic case is *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

27. This, of course, is the debate raised by *Kelo v. City of New London*, 545 U.S. 469 (2005).

28. Naturalization record of Charles T. Melms in the Milwaukee County Historical Society.

29. H. RUSSELL AUSTIN, *THE MILWAUKEE STORY: THE MAKING OF AN AMERICAN CITY* 81 (1946).

30. H. Russell Zimmermann, *South Side Building Recalls Those Early Brewing Days*,



largest breweries in Milwaukee.<sup>31</sup> In 1864, Melms constructed a handsome Italianate mansion on the site.<sup>32</sup> The house was placed high atop a terraced and landscaped garden overlooking Virginia Street. The terrace extended well to the west of the house, where Melms placed a beer garden with a fountain and gazebo (see Figure 1).<sup>33</sup>

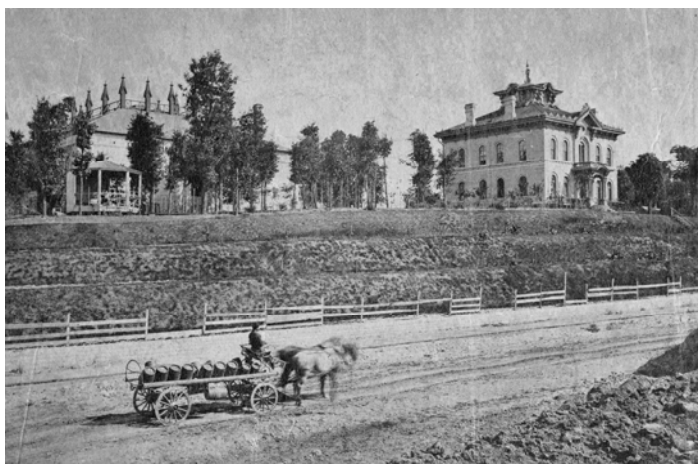


Figure 1. Melms mansion and beer garden, pre-1876, viewed from the southwest. Courtesy of the Wisconsin Historical Society. WHI-53917.

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MILWAUKEE J., Sept. 10, 1978, at 1. For a slightly different account, see LOUIS F. FRANK, *GERMAN-AMERICAN PIONEERS IN WISCONSIN AND MICHIGAN: THE FRANK-KERLER LETTERS, 1849–1864*, at 326 n.6 (Harry H. Anderson ed., Margaret Wolff trans., 1971) (“Melms’s brewery had passed through several hands before he acquired it in 1848. It was first established in 1841 by Simon Reutelshofer, who is generally regarded as the first to brew German-style lager beer in Milwaukee.”).

31. THOMAS C. COCHRAN, *THE PABST BREWING COMPANY: THE HISTORY OF AN AMERICAN BUSINESS* 54 (1948) (citing the Wisconsin Census of 1860). Melms’s brewery is listed as the largest in terms of production in barrels. This number may be in error, as it was almost twice the production of the next largest brewery and the other comparison statistics do not support this disparity. Melms’s brewery had the second-largest number of employees (ten), the second-largest average monthly pay roll (\$250), and the fifth-highest value of products (\$30,000). *Id.*

32. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 7–8, 79 N.W. 738, 738 (1899).

33. Transcript of Record at 24 (testimony), *Melms*, 104 Wis. 7, 79 N.W. 738. The cited document is a printed filing in the Wisconsin Supreme Court titled “Case”: it contains excerpts from the pleadings, testimony, exhibits, and findings in the lower court and is available, together with the briefs, in bound volumes titled *Wisconsin Reports: Cases and Briefs*, today found in the Eckstein Law Library at Marquette University. As the name suggests, the organization of these volumes corresponds to the official decisions in the *Wisconsin Reports*.

Figure 1 above shows the Melms mansion (on the right) and the beer garden and gazebo (on the left). The frontispiece to this article also shows the mansion. Figure 2 (on the next page) shows the site of the mansion on a late-nineteenth-century map of Milwaukee.



In 1869, Melms sat on a needle, and (in that era before antibiotics) developed an infection and then lockjaw.<sup>34</sup> As he lingered before dying, Melms executed a will leaving all his real and personal property to his wife, Marie, and urging her to carry on the family business.<sup>35</sup> Marie and two of C. T.'s brothers were named executors.<sup>36</sup>



Figure 3. C. T. Melms. Courtesy of the Milwaukee County Historical Society.

C. T. Melms's death at the age of 50 left his young widow, who spoke mostly German, with seven minor children to raise.<sup>37</sup> Marie wanted to keep the business going but quickly concluded it was impossible. The

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34. AUSTIN, *supra* note 29, at 82.

35. *Melms v. Pfister*, 59 Wis. 186, 187–88, 18 N.W. 255, 256 (1884).

36. *Id.*

37. Brief for Appellants at 1 and Supplemental Transcript of Record at 434 (Memorandum of Opinion), *Melms*, 93 Wis. 153, 66 N.W. 518. For a description and location of these materials, see *supra* note 33.

estate had debts far in excess of the value of its assets.<sup>38</sup> On legal advice, Marie decided to exercise her right to renounce the will, and instead to take homestead and dower rights in the property.<sup>39</sup> The homestead rights consisted of a life estate in the mansion and a quarter acre of land surrounding it. The dower rights consisted of a one-third life estate in all other real property that her husband had owned, including the brewery complex.<sup>40</sup> These marital property rights were subject to existing mortgages, but not to claims of unsecured creditors.<sup>41</sup> Because Marie renounced the will, the balance of C. T.'s property passed by intestate succession to his children.

After Marie renounced the will and took homestead and dower rights, the executors petitioned the probate court for permission to sell the remaining assets of the estate. The court granted this request, in the form of a License for Executors' Sale issued on January 5, 1870.<sup>42</sup> The assets were sold in multiple transactions. The property on which the mansion and the brewery stood, minus Marie's homestead and dower rights and subject to existing mortgages, was sold to Jacob Frey, Marie's brother-in-law, for \$379.50.<sup>43</sup> The purpose of this transaction, almost certainly, was to strip away the claims of as many unsecured creditors as possible.<sup>44</sup> If the unsecured creditors failed to object before the transaction was completed, there would be nothing but \$379.50 left in the estate to pay them.

Once the sale to Frey closed, Frey and Marie entered into a joint contract to sell all their interests in the Virginia Street property to Frederick Pabst and Emil Schandein, who were then doing business as

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38. Brief for Appellants, *supra* note 37, at 1–2.

39. *Melms*, 59 Wis. at 186, 18 N.W. at 255; Supplemental Transcript of Record, *supra* note 37, at 434 (Memorandum of Opinion).

40. *Melms*, 93 Wis. at 153–55, 66 N.W. at 518–20; Supplemental Transcript of Record, *supra* note 37, at 252–54, 361 (exhibits); *see* WIS. STAT. ch. 89, § 1 (1871) (stating that a widow is “entitled to a dower, or use during her natural life, of one-third part of all the lands” of her husband).

41. *Melms v. Pabst Brewing Co.*, 93 Wis. 140, 147–48, 66 N.W. 244, 246 (1896) (“[I]f [Marie Melms] took under the law, she took a life estate in the homestead, subject to mortgages . . . and she could take free of claims for unsecured debts her dower estate in the remaining real estate.”). This conclusion presumably refers at least in part to WIS. STAT. ch. 94, § 1 (1871) (“When the personal estate . . . shall be insufficient to pay all [the deceased’s] debts . . . , his executor or administrators may mortgage, lease, or sell his real estate (except the homestead) for that purpose . . .”).

42. Transcript of Record, *supra* note 33, at 79–80 (license); *see also* Supplemental Transcript of Record, *supra* note 37, at 414 (Memorandum of Opinion).

43. *Melms*, 93 Wis. at 153–55, 66 N.W. at 518–20.

44. COCHRAN, *supra* note 31, at 60.

the Phillip Best Brewing Company.<sup>45</sup> Marie sold her homestead and dower rights, and Frey sold everything that he had purchased from the estate. The sale to Pabst was for \$95,000, minus assumption of mortgages, netting \$40,000 for Marie, which was paid to her over time pursuant to a purchase-money mortgage.<sup>46</sup> Marie moved into humbler quarters, and used the money from the sale of the homestead and dower rights to support and educate her large brood of children.<sup>47</sup> Schandein and his family moved into the Melms mansion.<sup>48</sup>



Figure 4. Frederick Pabst. Courtesy of the Wisconsin Historical Society. WHi-60078.

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45. *Melms*, 93 Wis. at 153–55, 66 N.W. at 518–20.

46. *Id.* at 159–60, 66 N.W. at 519.

47. Marie lived in Milwaukee until 1879, when she moved to Massachusetts for a year and lived with her son, Gustav Melms. She thereupon lived a year in Chicago, five years abroad, another decade and a half or so in Milwaukee again, and, finally, her last year in Germany, the region from which she had emigrated to the United States ca. 1840. See Supplemental Transcript of Record, *supra* note 37, at 76 (testimony); *infra* note 72 (and source cited).

48. Transcript of Record, *supra* note 33, at 21–22 (testimony).

The next almost twenty years, Pabst and Schandein operated the Melms brewery as the South Side Brewery of the Phillip Best Brewing Company, later to be known as the Pabst Brewing Company.<sup>49</sup> The company made many improvements during this time, including building a bottling house (which still stands), an elevator, coal sheds, icehouses, and railroad sidings.<sup>50</sup>



Figure 5. Phillip Best Brewing Co.'s "South Side Brewery" along the Menomonee Canal, ca. 1880 (old Melms brewery in the background). Courtesy of the Wisconsin Historical Society. WHi-54326.

After the Melms children grew to be adults, some of them became convinced that they had been cheated out of their inheritance.<sup>51</sup> It seems they were unaware, at least initially, that their father's estate had been insolvent, or that their mother and their uncles had contrived to defraud many of the creditors of the estate. No doubt the transactions

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49. COCHRAN, *supra* note 31, at 61.

50. *Melms*, 93 Wis. at 162, 66 N.W. at 520.

51. See *id.* (noting that the children sued claiming that the transactions deprived them of their inheritance and were fraudulent).

of 1870 and 1871, which had the effect of removing the Melms family from the mansion their father had built and putting them in much-reduced circumstances, had not been characterized this way around the family dinner table.

In 1882, the children retained a lawyer and sued to set aside one of the sales of property by the estate, some six-and-one-half acres to the west of the brewery, described as lying in the “Menomonee Marsh,” which had been purchased by Guido Pfister.<sup>52</sup> The lawsuit advanced a number of technical grounds for invalidating the sale: for example, that the probate court had required notice of the sale in the “*Milwaukee Sentinel*,” but the notice had instead been published in the “*Milwaukee Daily Sentinel*.”<sup>53</sup> The most important claim was that an independent guardian should have been appointed to protect the rights of the Melms children.<sup>54</sup> This and all the other claims were rejected with little difficulty by both the circuit court and the Wisconsin Supreme Court.<sup>55</sup>

In 1886, Pabst and Schandein decided to consolidate their operations in an enlarged north side brewery, called the Empire Brewery. They closed the South Side Brewery and all its associated operations on Virginia Street. Schandein moved out of the mansion and died in 1888.<sup>56</sup> The bottling house, which was relatively new, was converted into a machine shop for the Norberg Manufacturing Company.<sup>57</sup> In 1891–1892, Pabst razed the mansion and graded the terraces on which it had stood, down to the level of the surrounding property.<sup>58</sup> His apparent objective was to prepare the property for sale or lease as an industrial site, the judgment being that it would obtain a higher price if uniformly graded and without the mansion.<sup>59</sup> The site was eventually sold to the Pfister & Vogel Leather Company.

About the same time Pabst was tearing down the mansion, the Melms children learned from an uncle that the sale of property by the estate to Frey in 1870 was vulnerable because their mother—one of the executors—was a secret beneficiary of this transaction. After further

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52. *Melms v. Pfister*, 59 Wis. 186, 18 N.W. 255 (1884).

53. *Id.* at 189, 18 N.W. at 257.

54. *Id.* at 190–91, 18 N.W. at 257.

55. *Id.* at 186–97, 18 N.W. at 255–60.

56. Brief for Appellants at 10, *Melms*, 104 Wis. 7, 78 N.W. 738; *see supra* note 33 (explaining where this document may be found).

57. *See* Rascher’s Fire Insurance Atlas of the City of Milwaukee 145–46 (1888).

58. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 8, 79 N.W. 738, 738 (1899); *see also* Brief for Appellants, *supra* note 56, at 10–11.

59. Transcript of Record, *supra* note 33, at 54–55 (testimony).

legal consultations, they decided to try their luck at litigation again. This time they sued their mother, as well as Pabst, claiming that the transaction from the estate to Frey was void, and hence Pabst had no valid title to the property.<sup>60</sup> They also claimed that the only interest Pabst had acquired in the homestead was their mother's life estate, and that the remainder after her death (she was still alive at the time) belonged to them.<sup>61</sup>

The Wisconsin Supreme Court addressed these claims in separate opinions in 1896. The claim that the sale to Frey was void for fraud was assigned to Justice Silas Pinney.<sup>62</sup> He concluded that the sale was merely voidable, not void, and that Pabst was a bona fide purchaser for value without notice of any fraud, and hence had good title.<sup>63</sup> Moreover, the children had waited too long to sue, and the action was barred by laches.<sup>64</sup>

Justice John Winslow was assigned to deal with the homestead.<sup>65</sup> The critical issue was whether the children's remainders were included in the rights sold by the estate to Frey in 1870. If the remainders were sold to Frey, then Frey had sold them to Pabst. If the remainders were not sold by the estate, they still belonged to the children.

The key document was the deed from the executors to Frey, executed on May 25, 1870, which was ambiguous on this point. It sold the entire parcel of land on Virginia Street, together with "brewery, buildings & improvements thereon," "excepting . . . that portion, which has been set apart as a homestead to the widow of the said deceased."<sup>66</sup> It then proceeded to set forth a metes-and-bounds description of the quarter acre of land set apart as the homestead, concluding with the qualification that the described quarter acre was "subject to four

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60. See *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 155–56, 66 N.W. 518, 518 (1896).

61. See *Melms v. Pabst Brewing Co.*, 93 Wis. 140, 143, 66 N.W. 244, 245 (1896).

62. *Melms*, 93 Wis. 153, 66 N.W. 518.

63. *Id.* at 165–70, 66 N.W. at 521–23.

64. *Id.* at 170–75, 66 N.W. at 523–25.

65. *Melms*, 93 Wis. 140, 66 N.W. 244.

66. Deed from Executors of Charles T. Melms to Jacob Frey, May 25, 1870, recorded in Milwaukee County Courthouse, May 31, 1870, vol. 115, p. 600. The License for Executors' Sale, dated January 5, 1870, authorizing the estate to sell all of the Virginia Street property, used similar language. It excepted from the authorization of sale "that portion which has been set apart as a homestead to the widow of the said deceased." Transcript of Record, *supra* note 33, at 80; *accord id.* at 80–81 (order dated May 25, 1870, confirming executors' sale).



mortgages on the whole property, including said homestead and to the right of dower, as herein above mentioned.”<sup>67</sup>

This can be interpreted in two different ways. By excepting “that portion” set aside for the homestead, did the deed except from the sale only Marie’s legal homestead rights, i.e., her life estate? Or did it except from sale both her life estate and the children’s remainders? If only the life estate was excepted, then the remainders were included in the property sold to Frey. If both the life estate and the remainders were excepted, then the remainders were not sold to Frey and instead descended to the children. The last quoted sentence is also unclear in its import. It seems to say that the quarter acre set aside as the homestead is subject to four mortgages and to Marie’s dower rights. Significantly, it does *not* say the described land is *subject to* Marie’s homestead rights—this would have clearly signaled that a fee simple in the quarter acre was excepted from sale. Rather, it says that the quarter acre is subject to four mortgages that apply to the whole property “including” the homestead (and is subject to the dower right). This carried forward the ambiguity about whether “the homestead” referred only to Marie’s life interest, or to her life interest plus the remainders.<sup>68</sup>

For reasons that are unclear, Pabst’s lawyers never focused on the language of the deed from the estate to Frey, either in the trial court or on appeal to the Wisconsin Supreme Court. Perhaps the trial court’s finding that the sale to Frey was a “mere sham,” and that Frey took the property upon “a secret trust” to hold it for Marie,<sup>69</sup> discouraged the lawyers from using the deed to establish a chain of title running from the children to Pabst. But the fact that Marie and Frey conspired to defraud third parties should have had no bearing on the validity of the chain of transactions as among the estate, Frey, and Pabst and Schandein—none of whom was found to have committed fraud on the other. In any event, Pabst’s lawyers made no attempt to establish a chain of title, relying instead on other arguments in favor of holding that Pabst had acquired

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67. Deed from Executors of Charles T. Melms, *supra* note 66.

68. It is of course rather odd that if only a life estate were excepted, the deed would also make special note of the fact that the dower rights were excepted. The dower rights were also a life estate, *see* WIS. STAT. ch. 89, § 1 (1871) (stating that a widow is “entitled to a dower, or use during her natural life, of one-third part of all the lands” of her husband), so the deed would be excepting a life estate in a life estate. But the dower rights were a life estate in a thirty-three percent interest in all the land of which the husband died seized, whereas the homestead was a full life estate in only the family home and one-quarter acre of land. I would attribute any overlap to lawyerly caution in wanting to cover all the bases.

69. *See Melms*, 93 Wis. at 142, 66 N.W. at 246; Supplemental Transcript of Record, *supra* note 37, at 416 (Memorandum of Opinion).

the remainders, which Justice Winslow had no difficulty resolving in favor of the children.<sup>70</sup> The result was that Pabst was found to have acquired only a life estate *pur autre vie* in the homestead property, which would expire upon the death of Marie.<sup>71</sup> (She would die in late 1899.<sup>72</sup>)

The conclusion that Pabst had acquired only a life estate was, in my view, almost certainly wrong. The License for Executors' Sale and the deed to Frey were admittedly ambiguous. But the ambiguity should have been resolved in favor of Pabst, for three reasons. First, the deed that Marie and Frey executed when they sold their interests to Pabst a year later was a *warranty deed*, promising that Marie and Frey jointly had sufficient interests to confer fee-simple title on Pabst.<sup>73</sup> Such a deed necessarily meant that Marie and Frey were selling both Marie's interest in the homestead and the remainder interests in the homestead.<sup>74</sup> Second, Wisconsin law at the time provided that ambiguous grants of land should be construed as conveying "all the estate."<sup>75</sup> All the estate here would mean both the life estate and the remainders. Finally, ambiguous deeds are construed against the drafter.<sup>76</sup> Since Marie, as an executor of her husband's estate, had signed the deed to Frey, any ambiguity in that deed should have been construed in favor of the

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70. Pabst argued that when Marie renounced the will and elected to take marital property rights under the law, she nevertheless still inherited the remainders under the will. The court responded that the statutes called for an election: either one takes under the will or one renounces the will—it is all or nothing. *See* 93 Wis. at 145–48, 66 N.W. at 249. Pabst argued in the alternative that, by assuming the mortgages on the homestead property, he acquired an equitable title to the remainders. The court rejected this, too, noting that assumption of the mortgages was part of the original consideration for the conveyance from Marie to Pabst and Schandein, and was not a voluntary undertaking by Pabst to preserve the title of the remaindermen. *Id.* at 148–50, 66 N.W. at 245–47.

71. *Id.* at 145, 66 N.W. at 246.

72. *See Mail Bag Used as Hearse*, LIMA NEWS (Lima, Ohio), Dec. 14, 1899 (stating that “[s]o far as known, for the first time the United States mails have been used as a hearse” and recounting how the ashes of Marie Melms, widow of C. T. Melms, were returned by mail from Germany for burial in Milwaukee).

73. Supplemental Transcript of Record, *supra* note 37, at 341–44 (Exhibit 65: Deed from Frey and wife and Marie Melms to Pabst and Schandein).

74. A warranty deed is one in which “the grantor assures the grantee that there are no defects in the title whatsoever . . .” 14 POWELL ON REAL PROPERTY, *supra* note 6, § 81A.03[1][b][ii]. Wisconsin decisions from the period of *Melms* frequently employ the term in this sense. *See, e.g.,* Dietrich v. Koch, 35 Wis. 618, 620 (1874); Hooe v. Chi., Milwaukee & St. Paul Ry. Co., 98 Wis. 302, 302–03, 73 N.W. 787, 787 (1898).

75. WIS. STAT. ch. 103, § 2278 (1878) (providing “[e]very devise of land . . . shall be construed to convey all the estate”).

76. 14 POWELL ON REAL PROPERTY, *supra* note 6, § 81A.05[3][b][i]; *see, e.g.,* Lintner v. Office Supply Co., 196 Wis. 36, 42–43, 219 N.W. 420, 422 (1928).

grantee, Frey, meaning that he received the remainders. For multiple reasons, then, the instruments should have been construed to mean that the estate sold the children's remainders to Frey, who in turn sold them to Pabst.

Did the estate have the authority to sell the children's remainders? Almost certainly it did. These were vested remainders, not contingent remainders, and vested remainders have always been regarded as being alienable *inter vivos*.<sup>77</sup> When Marie rejected the will, electing to take a life estate in the homestead, the remainders in the homestead were inherited by the children, who were minors. The Wisconsin Supreme Court, in the *Pfister* case decided in 1884, had specifically held that Marie, as an executor of the estate and legal guardian of the children, was competent to act on their behalf.<sup>78</sup> Thus, the estate had the authority to sell the children's remainders in the homestead, just as it had authority to sell all the other interests that the children had inherited by intestate succession from their father.<sup>79</sup>

The Wisconsin Supreme Court's erroneous ruling that Pabst had only a life estate in the homestead nevertheless gave the Melms children their third and final shot at securing some satisfaction from the Pabst Company. If Pabst had only a life estate, then Pabst had a legal duty not to commit waste to the injury of the remaindermen, i.e., the Melms children. Accordingly, the children sued Pabst yet again, this time for committing voluntary waste by demolishing the mansion on the homestead property in 1891–1892.<sup>80</sup> Under Wisconsin law at the time, a party who committed waste was liable for double damages.<sup>81</sup> The children sought to show that the mansion had a substantial value, and that they were entitled to recover not only possession of the one-quarter acre of homestead land once their mother died, but also two times the cost of restoring the mansion as it had been before its destruction.<sup>82</sup>

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77. 3 THOMPSON ON REAL PROPERTY § 23.06 (David A. Thomas ed., 2d ed. 2001).

78. *Melms v. Pfister*, 59 Wis. 186, 189–91, 18 N.W. 255, 259 (1884) (discussed in text accompanying notes 52–55 *supra*).

79. A potential complication here is that the eldest Melms son may have reached the age of majority (twenty-one) by the time the estate sold the property to Frey. But it does not appear that this was ever asserted by the children as a ground for overturning the sale to Frey.

80. See *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 79 N.W. 738 (1899).

81. *Id.* at 7, 79 N.W. at 738 (citing WIS. STAT. § 3176 (1898)).

82. See Transcript of Record, *supra* note 33, at 17–26 (testimony).

It is not unlikely that the Wisconsin Supreme Court, when it heard the third *Melms* lawsuit in 1899, realized that it had made an error in holding that the Melms children had remainders in the homestead property. At the very least, it must have realized that it would be highly inequitable to penalize Pabst for acting as though he owned the mansion outright when he had every reason to believe, based on the representations of the parties from whom he had purchased the property, that he owned the mansion outright. The right thing to have done—the candid, forthright, courageous thing to have done—would have been to overturn the decision about title to the homestead, or at least to absolve Pabst from liability based on a good-faith error. But, perhaps to avoid an embarrassing reversal, the Wisconsin Supreme Court did not do the right thing. Instead, it fudged the facts, and, in so doing, transformed the law of waste.

### III.

When the Melms children's waste action went to trial, the opposing sides presented very different views of the waste issue. The children's theory was that they were entitled to inherit a specific thing—the mansion built by their father. In order to make them whole, Pabst was required to pay an amount that would permit the mansion to be reconstructed. The children therefore submitted testimony designed to show the cost of rebuilding the mansion. They offered witnesses who testified to the high quality of the materials: marble floors, carved banisters, a large dance room—even indoor plumbing and steam heat.<sup>83</sup> An architect testified it would cost at least \$25,000 to rebuild;<sup>84</sup> C. T. Melms's youngest brother, who was in the fire insurance business, testified that that it would cost \$25,000;<sup>85</sup> a building contractor testified that it would cost "about \$20,000."<sup>86</sup>

Pabst presented a very different view of the matter. In his view, the critical question was the market value of the mansion. The children, he conceded, were entitled to the land on their mother's death, but they should not be awarded damages for waste if the presence of the mansion added nothing to the value of the land. Pabst's witnesses therefore testified that the mansion, if it still stood, would have little or no rental

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83. *Id.* at 17–18 (testimony of Gustav Melms).

84. *Id.* at 19 (testimony of Charles A. Gombert).

85. *Id.* at 22 (testimony of Leopold Melms).

86. *Id.* at 24–25 (testimony of George B. Posson).

value and would not be attractive to purchasers at any price. Some witnesses said that the elevation of the structure high above the street meant that there were too many steps to climb.<sup>87</sup> Others testified that the dominant use of property on the north side of Virginia Street had changed from residential to manufacturing, and that the highest and best use of the land would be as a factory site.<sup>88</sup> The picture they painted was of a forlorn house perched on a high knoll, surrounded by industrial property. The circuit court ruled that Pabst had not committed waste.<sup>89</sup>

The Wisconsin Supreme Court unanimously affirmed. Justice Winslow, perhaps as penance for his decision in the homestead case, was again given the honors of writing the opinion. He made a valiant effort to appear to preserve continuity with the past. There was nothing wrong with traditional definitions of waste, he wrote, including Wisconsin precedent holding that “any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration.”<sup>90</sup> The basic concepts should remain “much the same.”<sup>91</sup> Nevertheless, it was important to recognize that application of these concepts was necessarily subject to “reasonable modifications as may be demanded by the growth of civilization and varying conditions.”<sup>92</sup>

Thus, although the Wisconsin court had previously held that it was waste for a tenant to cut a hole in the roof of a boarding house to install a chimney, the present case involved “radically different”<sup>93</sup> elements. What was so radically different about Pabst’s destruction of the Melms mansion? Simply put, the neighborhood had changed. The Wisconsin Supreme Court painted a picture of inexorable socioeconomic change sweeping the south side of Milwaukee:

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87. *Id.* at 27–28 (testimony of D.G. Rogers); *see also id.* at 39 (testimony of A.L. Worden); *id.* at 40–41 (testimony of R.C. Reinertsen).

88. *Id.* at 32 (testimony of Fred Vogel, Jr.); *id.* at 34 (testimony of C.W. Milbrath); *id.* at 37 (testimony of Emil Durr); *id.* at 44 (testimony of George Bensenberg).

89. *Id.* at 12–14 (findings and judgment); *Melms*, 104 Wis. at 9, 79 N.W. at 738.

90. *Melms*, 104 Wis. at 10, 79 N.W. at 739 (quoting *Brock v. Dole*, 66 Wis. 142, 28 N.W. 334 (Wis. 1886)).

91. *Id.* at 11, 79 N.W. at 739.

92. *Id.*

93. *Id.* at 13, 79 N.W. at 740.

The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control.<sup>94</sup>

Under the circumstances, the court indicated, no reasonable person in Pabst's position could ignore the new conditions in the neighborhood.

The court reinforced its emphasis on changed circumstances by noting a variety of agricultural analogies. If an orchard was rendered permanently unproductive by disease or death of the trees, would the tenant be prohibited from turning the land into a vegetable garden?<sup>95</sup> If the market for grain collapsed, would a wheat farmer be prohibited from planting the fields with tobacco?<sup>96</sup> The most dramatic analogy was to a North Carolina case, which had considered whether it was waste for a life tenant, after the Civil War, to allow quarters for former slaves to fall into disrepair.<sup>97</sup> The Wisconsin Supreme Court thought it was entirely proper to hold in those circumstances that the duty of the tenant was not to preserve the slave quarters intact, but to act as "a prudent owner of the fee" would have acted in the face of the dramatic change brought on by emancipation—in other words, to let the slave quarters deteriorate.<sup>98</sup>

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94. *Id.*

95. *Id.* at 14, 79 N.W. at 740.

96. *Id.*

97. *Id.* at 14–15, 79 N.W. at 740–41 (citing *Sherrill v. Connor*, 12 S.E. 588 (N.C. 1890)).

98. *Id.* at 15, 79 N.W. at 741.

The Wisconsin Supreme Court said that its decision was not to be construed as justifying a tenant in making substantial changes in order “to suit his own whim or convenience” or because the changes would be “in some degree beneficial.”<sup>99</sup> But the Melms mansion had “no practical value, and would not rent for enough to pay the taxes and insurance thereon”; if converted to “business property, it would again be useful, and its value would be largely enhanced.”<sup>100</sup> The court concluded that when “there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used,” the question whether the tenant “has been guilty of waste in making changes necessary to make the property useful” was a question of fact, to be decided by the trier of fact.<sup>101</sup>

It would be an overstatement to say that *Melms* unequivocally repudiated the understanding of property as the right to specific things, and substituted in its place an understanding of property as a storehouse of wealth measured by market prices. After all, the court insisted that, ordinarily, a tenant is obliged to return the thing in a substantially unchanged condition when the tenancy ends.<sup>102</sup> But by creating an exception for changed circumstances, the court moved a long way toward embracing the understanding of property as economic value. The court asked rhetorically at one point, “Must the tenant stand by and preserve the useless dwelling-house, so that he may at some future time turn it over to the reversioner, equally useless?”<sup>103</sup> The statement implies, at least when market values change significantly, that the duty to preserve the identity of the thing is trumped by considerations of economic value.

#### IV.

The decision of the Wisconsin Supreme Court in *Melms* rests on one of the oldest tricks in the appellate court playbook: changing the facts to fit the desired result. The Melms mansion was affected by changed circumstances before it was demolished, but the changes were not the product of urban growth or socioeconomic changes to the

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99. *Id.*

100. *Id.* at 8–9, 79 N.W. at 738.

101. *Id.* at 15–16, 79 N.W. at 741.

102. *Id.* at 10, 79 N.W. at 739.

103. *Id.* at 13, 79 N.W. at 740.

neighborhood. The changes were due to the actions taken by Pabst himself.<sup>104</sup>

When Pabst and Schandein purchased the property, the mansion and the beer garden were an integral part of a valuable and fully functioning brewery operation. The mansion would be occupied by the brewmaster and his family, who would oversee the operations of the brewery, the malt house, the bottling plant, and the other associated facilities. The beer garden on the terrace, in common with other breweries operated by German families in Milwaukee in the nineteenth century, served as an important marketing tool in selling beer. The house and beer garden stood on an elevation facing a dense residential neighborhood and beckoned to thirsty customers on warm evenings. Photographs from the era show that other brewery operations had beer gardens on elevated terraces and brewmaster houses that were somewhat similarly located in relation to the brewing operations.<sup>105</sup>

The first action taken by Pabst that undermined the economic value of the mansion was the decision to open a new bottling plant in 1881, just to the west of the mansion.<sup>106</sup> This required cutting down a large portion of the terrace that served as a beer garden. Several years later, Pabst closed the South Side Brewery and consolidated his operations in the Empire Brewery on the north side. Considering only access to transportation, this was a questionable decision. The South Side Brewery had an enviable location, abutting both water and a rail line. These facilities provided the South Side Brewery with ready access to the two principal modes of commercial transport at the time. The Empire Brewery, which was landlocked, had neither advantage, and thus incurred the additional expense of having its barrels hauled to a train station or docking facility. It is possible that changing demographics had something to do with the decision. The south side

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104. The witnesses for Pabst in the circuit court were well aware of these facts, and carefully avoided any claim that the circumstances facing the Melms mansion in the early 1890s were attributable to anything other than Pabst's own actions. *See* Transcript of Record, *supra* note 33, at 26–61 (testimony).

105. *See, e.g., The Milwaukee of a Half Century Ago: A City of Foaming Beer and Good Music*, MILWAUKEE J., Nov. 16, 1932, at 1, available at <http://www.wisconsinhistory.org/whba/articleView.asp?pg=8&id=11277&key=Immigrant&cy=> (last visited April 13, 2011) (containing an illustration of Schlitz Park which displays a structure elevated on a hill). The elevation may have been to provide for underground storage and natural refrigeration for the brewing operation.

106. Zimmermann, *supra* note 30, at 1. The building, which still stands, bears the date “1881” on the cornice.



was rapidly being populated with Polish immigrants,<sup>107</sup> and Pabst may have regarded the north side, which was more heavily German, as a more congenial location. The critical point is that the decision by Pabst to close the South Side Brewery was not forced on him by economic necessity but was a voluntary decision of uncertain motivation.

Closing the South Side Brewery set in motion a series of actions that led to the destruction of the mansion. Once the brewing operations were eliminated, it no longer made sense to keep a beer garden and brewmaster's house on the property. Sure enough, without a brewery to supervise, Schandein moved away, leaving the house vacant. The remaining terrace on which the beer garden stood was soon cut away, leaving "an isolated lot and building, standing from twenty to thirty feet above the level of the street."<sup>108</sup> Critically, it was this point in time—when the house stood empty on an isolated knoll—that the Pabst witnesses used as their point of reference in commenting on the market value of the mansion.<sup>109</sup> But the fact that the mansion had much-diminished market value because of its physical isolation and lack of a tenant was entirely due to decisions made by Captain Pabst.

What then about the neighborhood? The Wisconsin Supreme Court suggested that the neighborhood had been transformed from residential to industrial, and hence was no longer a fit place for a family to live.<sup>110</sup> But a careful review of the testimony offered by the Pabst witnesses reveals that no one claimed the neighborhood in general was no longer residential. Maps from the era show that the south side of Virginia Street, directly opposite the mansion, remained fully residential, as did much of the area farther to the south and east of the property. To the south of Virginia Street, the area was, and indeed today still is (one short block farther south), completely residential. These matters can be seen in Figures 6 and 7 on the following page.

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107. JOHN GURDA, *THE MAKING OF MILWAUKEE* 172–73 (3d ed. 2008).

108. *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 8, 79 N.W. 738, 738 (1899).

109. *See, e.g.*, Transcript of Record, *supra* note 33, at 38–41 (testimony of Worden, Reinertsen).

110. *Melms*, 104 Wis. at 8, 79 N.W. at 738 (the mansion became “wholly undesirable” as a residential property).



Figure 6. This map, primarily taken from *Rascher's Fire Insurance Atlas of the City of Milwaukee* (1876 as updated 1885) and combined with the 1888 *Rascher's*, depicts the Melms mansion and vicinity at the time of the 1891–1892 teardown. Note the neighborhood of houses on the other side of Virginia St. and continuing south toward Park St. (and farther south beyond the margin of this excerpted image). Courtesy of the Milwaukee Public Library.



Figure 7. This modern aerial view (© Google) shows the site today. Note the houses on Bruce St. (formerly Park St.) and continuing to the south.

There is a broader lesson in this mischaracterization of the facts. If demolishing the mansion was ameliorative waste, then the tenant himself created the condition that he was ameliorating. This suggests a serious complication in using economic value as a measuring stick for determining waste. What is the temporal baseline against which one measures changes in economic value? In the *Melms* case, if the baseline is 1870, when the South Side Brewery was a fully functioning operation, tearing down the mansion would have reduced the market value of the property. If the baseline is 1890, when Captain Pabst had closed the brewery and excavated around the mansion, then tearing down the mansion presumably enhanced the market value of the property. By picking 1890 (or so) rather than 1870 as the baseline, the Wisconsin courts made it much easier to let Captain Pabst off the hook.<sup>111</sup>

## V.

These ruminations about the *Melms* case are designed to explain a fundamental shift in the law of waste. This is not the shift usually discussed in the literature. Starting with Morton Horwitz's work, American scholarship has focused on the early nineteenth century as a time when the law of waste took a decisive turn away from English law, allegedly in the direction of a more flexible pro-development doctrine.<sup>112</sup> Whether any such turn occurred at that time is doubtful. Some of the cases discussed by Horwitz in fact reaffirmed the English view.<sup>113</sup> In any event, the cases cited in support of the supposed break with English law all involved issues of agricultural cultivation, especially clearing trees for planting. It is not clear that there was any real difference between

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111. There was still the matter of the quarter acre of land on which the mansion sat, which was included in the Melms homestead rights. Pabst succeeded in acquiring the remainder interest of one of the seven children, and brought an action in partition against the other six children, hoping to force a judicial sale and acquire the remaining rights. In its fifth reported decision involving the Melms children, the Wisconsin Supreme Court refused to grant partition, on the ground that Pabst held the entire life estate and hence there was no "divided possession" between Pabst and the children. *Pabst Brewing Co. v. Melms*, 105 Wis. 441, 443, 81 N.W. 882, 882 (1900). Although Marie had died the previous year—which meant that Pabst and the children did have divided possession—apparently no one apprised the Wisconsin Supreme Court of this fact.

112. See HORWITZ, *supra* note 3. PURDY, *supra* note 3, and Sprankling, *supra* note 3, appear largely to accept this characterization.

113. See HORWITZ, *supra* note 3, at 54–55 (discussing *Jackson v. Brownson*, 7 Johns 227 (N.Y. 1810), which applied English waste law). Horwitz relies primarily on statements made by the dissent. See *id.* at 55. PURDY, *supra* note 3, at 50–53, also vests great significance in the *Jackson v. Brownson* dissent.

English and American law on this point.<sup>114</sup> If there were differences in the results reached, they are easily explained by differences in the facts on the ground: the English cases involved an established agrarian society and American cases an agrarian society in the process of being created out of a wilderness. There is no reason to believe that the English courts, if they had had jurisdiction, would have decided the cases about clearing forests to plant crops any differently than the American courts did.

The real transformation in the American law of waste occurred not in the nineteenth century, but in the twentieth. That transformation was not a manifestation of inexorable social and economic change. Rather, it was a top-down reform influenced by the Legal Realist movement. Two decisions framed the argument for reforming the law of waste. One was *Melms*. The other was a New York decision, *Brokaw v. Fairchild*.<sup>115</sup> The two decisions involved striking similarities in their facts, but very different outcomes.<sup>116</sup>

At the center of both cases were large stately mansions constructed in the latter half of the nineteenth century. In each, a life tenant wanted to tear down the mansion and replace it with a more economically valuable use: industrial property in the case of the *Melms* mansion,<sup>117</sup> a high-rise apartment in the case of the *Brokaw* mansion.<sup>118</sup> In each, persons with interests in remainders following the life estate objected to the destruction. In *Melms*, the heirs of the *Melms* estate sought double damages under Wisconsin law after the life tenant demolished the mansion.<sup>119</sup> In *Brokaw*, nieces and nephews who had a small chance of inheriting the property sought an injunction to prevent the life tenant from tearing down the mansion.<sup>120</sup>

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114. *Melms* itself cited two English equity cases, noting that “even in England” a change in agricultural uses by a tenant “will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change which rather improves the inheritance than injures it.” *Melms*, 104 Wis. at 11, 79 N.W. at 739 (citing *Doherty v. Allman*, (1878) 3 App. Cas. 709 (H.L.), and *In re McIntosh*, (1891) 61 L.J.Q.B. 164).

115. 237 N.Y.S. 6 (Sup. Ct. 1929), *aff’d mem. per curiam*, 245 N.Y.S. 402 (App. Div. 1930), *aff’d mem. per curiam*, 177 N.E. 186 (N.Y. 1931).

116. The *Restatement of Property* gives two illustrations of ameliorative waste, one based on the facts of *Melms* and the other based on the facts of *Brokaw*. RESTATEMENT (FIRST) OF PROPERTY § 140 cmt. f (1936).

117. *Melms*, 104 Wis. at 13, 15–16, 79 N.W. at 740, 741.

118. *Brokaw*, 237 N.Y.S. at 14.

119. *Melms*, 104 Wis. at 7, 79 N.W. at 738.

120. *Brokaw*, 237 N.Y.S. at 12.

The orthodox view of the two cases, as it emerged in the 1930s, is roughly as follows. *Melms* was correctly decided.<sup>121</sup> The *Melms* court recognized that a rigid and unbending view of ameliorative waste is undesirable. Courts should not always insist on preservation of the property, but should take into account a variety of factors, such as changed circumstances of the neighborhood and relative economic values, before deciding whether ameliorative waste should be condemned. The Wisconsin Supreme Court, in deciding that the Pabst Brewing Company had not committed waste, was therefore correct to eschew any rigid rule against fundamental transformation of the property.

*Brokaw* (the orthodox view continues) was wrongly decided.<sup>122</sup> Isaac Brokaw, a wealthy New Yorker, built a complex of mansions on Fifth Avenue between 79th and 80th streets.<sup>123</sup> He left each of his children a mansion, to be held by them for life, and then inherited by their children; only if his children left no children was the property to be inherited by his other children's children, that is, the nieces and nephews of the life tenant.<sup>124</sup> After Isaac's death in 1913, the preferred use of land on Fifth Avenue changed, with mansions coming down and apartment buildings going up. Isaac's son George, who had the mansion at the corner of 79th Street and Fifth Avenue, found living in the old mansion oppressive. It was large and drafty, and expensive to maintain. George tried to rent it out, but found no takers. He proposed demolishing the mansion and building a thirteen-story apartment building.<sup>125</sup> When some of his nieces and nephews objected, the New York courts agreed that demolition of the mansion would be waste.<sup>126</sup>

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121. RESTATEMENT (FIRST) OF PROPERTY § 140 cmt. f (1936) (using the facts of *Melms* as an illustration and indicating that the case was decided correctly).

122. *Id.* (using the facts of *Brokaw* as an illustration and indicating that the case was decided incorrectly).

123. *Brokaw*, 237 N.Y.S. at 9–10.

124. *Id.* at 12.

125. *Id.* at 10–11.

126. *Id.* at 14.



Figure 8. The Isaac Brokaw Mansion, 5th Avenue and 79th Street, New York City. Undated. The mansion was razed in 1965 in favor of a 25-story apartment building. Courtesy of the Museum of the City of New York. The Underhill Collection. B.1642.

The *Brokaw* decision was widely condemned by leading law professors of the day, especially those influenced by the Realist movement.<sup>127</sup> It was decried as rigid and unreasonable, an impediment to progress.<sup>128</sup> A blue-ribbon panel of law reformers, the New York Law Revision Commission, recommended that the decision be overturned by the New York legislature.<sup>129</sup> The commission's idea of a sound approach to the law was the Wisconsin Supreme Court's decision in *Melms*.<sup>130</sup> The commission proposed a five-part test for determining whether an action is waste, including whether the area has experienced changed circumstances and whether the modification would enhance the value of

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127. See, e.g., Merryman, *supra* note 13, at 97–98 (describing *Brokaw* as “notorious” and “unfortunate”).

128. See *id.* at 98–99 (describing reaction of New York legislature to remove effect of case by creating a more flexible rule).

129. N.Y. Leg. Doc. No. 60(G), 158th Sess. 7, 45 (1935).

130. See *id.* at 51–52.

the property.<sup>131</sup> The New York legislature adopted the proposed law in 1937, and it remains in effect today.<sup>132</sup>

The New York reform proved to be highly influential with bodies such as the American Law Institute, which also adopted a test consistent with *Melms* for inclusion in the *Restatement of Property*.<sup>133</sup> Eventually, a majority of states adopted the *Melms* approach, looking to multiple factors including changed circumstances and economic value in deciding whether voluntary transformation of property should be regarded as waste.<sup>134</sup> Only a minority—about ten states—continue today to adhere to the *Brokaw* approach, which condemns as waste any material alteration of the property.<sup>135</sup>

At bottom, *Melms* and *Brokaw* embody conflicting views of the basic purpose of the law of property. *Brokaw* views property as an individual right. Isaac Brokaw had a right to specify that his grandchildren would inherit the mansions he built. This is different from the right to say that they would inherit either the mansions or something else having equal or greater monetary value, such as an apartment house. *Melms* is understood to embody the view of property as a social institution. The ultimate question is, what was the highest and best use of land? Is the site better suited for a mansion or a factory? If the correct answer is a site for a factory, then the law should facilitate the efforts of individuals to reach the correct answer, without regard to what particular individuals with possibly idiosyncratic views might think.

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131. See *id.* at 60–61.

132. See 1937 N.Y. Laws 618, 618–19; N.Y. REAL PROP. ACTS. LAW § 803 (McKinney 2009).

133. RESTATEMENT (FIRST) OF PROPERTY §§ 138–145 (1936). Richard Powell, the Reporter for the Restatement, described the *Melms* decision as “eminently sound.” 9 A.L.I. PROC. 78, 123 (1930–1931).

134. See Lovett, *supra* note 3, at 1212–16.

135. Gina Cora, Want Not, Waste Not: Contracting Around the Law of Ameliorative Waste 11 (Apr. 1, 2009) (Yale Law School Student Scholarship: Student Prize Papers: Paper 47), [http://digitalcommons.law.yale.edu/ylsspps\\_papers/47](http://digitalcommons.law.yale.edu/ylsspps_papers/47). The article also notes that nine states and the District of Columbia have no law on the subject. *Id.* at 1. As Judge Posner points out in his comment, the property casebook I authored with Henry Smith describes the *Melms* approach as a “minority” view. Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095, 1096 n.4 (2011) (citing THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 604 (2007)) [hereinafter *Comment*]. We wrote without the benefit of Ms. Cora’s fifty-state survey, see Cora, *supra*, which shows that some kind of multifactor or economic-value approach is now the majority view and that the common-law test applied in *Brokaw* has become the minority view. The statement in the casebook will be revised in the next edition.

*Melms* is the catalytic decision that began the process of remaking the doctrine in this fashion.<sup>136</sup>

This is why I said at the outset that *Melms* may be the most important U.S. decision on the subject of waste. It served as the model for what the modern approach to waste should look like, and led, directly or indirectly, to a reformation in the doctrine that now prevails in a majority of American jurisdictions. Before *Melms*, a *Brokaw*-like understanding prevailed, whereby the tenant was required to return the property to the absent owner without material alteration.<sup>137</sup> After *Melms*, the understanding has increasingly become that the tenant is required to return something of equal (or greater) economic value to whatever it was the absent owner gave up.

## VI.

The ultimate question, of course, is whether this was a change for the better. To help answer that question, we need to consider how the doctrine of waste actually functions in the modern world.

It turns out that it functions silently, and mostly in the background. The reason for this is that the issues governed by the law of waste are today largely handled by contract.<sup>138</sup> The law of waste has always been understood to be subject to modification by contract. At common law, if a conveyance was made “without impeachment for waste,” this meant the tenant was free to make modifications to the property that otherwise might be chargeable as waste.<sup>139</sup> Over time, contractual provisions concerning the treatment of property by tenants have become ubiquitous, to the point where the action for waste is rarely invoked.<sup>140</sup>

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136. Although *Melms* used economic value as only one factor to be considered in determining whether a tenant has committed waste, economic value will be strongly correlated with other factors the court cited, such as changed circumstances and reasonable use. Thus, it was not too great a distance from *Melms* to regarding loss of economic value as the defining characteristic of waste. Indeed, Wisconsin has moved in this direction. See *Manor Enter., Inc. v. Vivid, Inc.*, 228 Wis. 2d 382, 401–02, 596 N.W.2d 828, 837 (Ct. App. 1999) (stating that an action for waste lies only when the tenant has caused “a substantial diminution in the value of the estate”).

137. See *supra* note 19 and accompanying text (regarding “material alteration”).

138. See PURDY, *supra* note 3, at 665.

139. 8 POWELL ON REAL PROPERTY, *supra* note 6, § 56.02.

140. The evidence for this is inferential rather than direct. Judge Posner cites an electronic search revealing 255 “waste cases” in the last ten years. Posner, *Comment*, *supra* note 135, at 1099 n.9. But without further details, it is difficult to know how many of these cases involved a seriously contested waste claim. The most comprehensive treatment of waste in a modern treatise is STOEBCUK & WHITMAN, *supra* note 2, which devotes five



The reason for this is probably that the costs of contracting have steadily fallen, first through the widespread use of standard-form contracts, more recently through the use of easily copied digital files. As contracting has become cheaper, contractual solutions have increasingly squeezed out the solution imposed by the law of waste.

Consider landlord-tenant relations. The law of waste provides an important background principle for landlord-tenant relations. But today, nearly every leasehold longer than a month-to-month tenancy is governed by a written lease.<sup>141</sup> And nearly every written lease will spell out, in some fashion, the respective duties of the landlord and tenant in terms of maintaining the property, as well as the tenant's obligation to obtain the landlord's permission before undertaking any significant modification of the property.<sup>142</sup> When disputes arise over the tenant's failure to maintain the property, or over the tenant's attempts to change the property, these disputes are nearly always resolved in terms of these lease provisions, not in terms of the law of waste.<sup>143</sup>

Similarly, take family wealth settlements. Again, if someone wants to divide family property over two or more generations, the law of waste provides an important background principle in describing the respective duties of the present and future generations. But today, if specific assets are conveyed to one person for life and then to one or more remaindermen after that person dies, this is nearly always done by creating a trust.<sup>144</sup> The trust instrument will spell out what powers the trustee has to sell, mortgage, or modify specific assets held in trust. When a dispute arises over whether to turn the family mansion into a bed-and-breakfast, it will be resolved by the trustee, subject to review

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sections to the subject. *See id.* §§ 4.1–4.5. For the last two decades covered by their treatise (1980–2000), they cite twenty-eight appellate decisions from twenty-one states. In other words, appellate decisions worth citing are being produced at a rate of only slightly more than one per year, and there are no notable opinions in over half of the states during this period. Of course, appellate opinions are but a small fraction of cases filed in trial courts. Nevertheless, the treatise data suggest to me that relatively few waste claims are advanced in court, and that the vast majority of disputes between landlords and tenants, or between life beneficiaries and remaindermen, are today resolved by contract.

141. 2 MILTON R. FRIEDMAN & PATRICK A. RANDOLPH, JR., *FRIEDMAN ON LEASES* § 22:2.1, at 22–10 (Patrick A. Randolph, Jr. ed., 5th ed. 2004).

142. *See id.* § 22:7, at 22–28 (describing how parties intending to change the premises during a lease ought to include within the lease specific agreements and outlines of plans).

143. *Id.* § 22:2.1, at 22–10 (“Current leases invariably make some reference to alterations or improvements of the leased premises, and it is the interpretation and construction of these stipulations that govern the rights and duties of today’s tenants.”).

144. *See* JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 553 (8th ed. 2009) (noting that conveying a life estate outside a trust is today “rare and almost always unwise”).

for compliance with the trust instrument and general trustee duties, not under the law of waste.<sup>145</sup>

Importantly, nearly every dispute over the tenant's treatment of property presents not one but two potential opportunities to resolve the issue by contract. The issue can be resolved *ex ante*, by drafting appropriate provisions in the lease or the trust. But if the issue is overlooked, or the parties are not happy with the resolution that has been adopted *ex ante*, then there will be another opportunity to negotiate a contractual solution *ex post*. *Ex post*, the transaction costs of contracting will be higher, given that the parties are locked into a relationship with each other—a bilateral monopoly—and this can lead to extensive strategic maneuvering or even to bargaining breakdown.<sup>146</sup> Nevertheless, contractual modifications of duties toward specific property can be and often are modified *ex post*. Landlords and tenants do renegotiate leases, and beneficiaries do persuade trustees to modify their management of property under trust. These negotiations provide a second opportunity for a contractual solution, if for some reason the parties are dissatisfied with the first contractual solution.

Because the law of waste has been largely superseded by contract, the question about what form the law of waste should take can be seen as a question about the best default rule—that is, the best gap filler to apply when the contract is silent.<sup>147</sup> If we view the doctrine as a type of contract default rule, what is the best version of the law of waste?

Given that nearly all disputes between tenants and absent owners are today resolved by contract, a simple, intuitive rule that is easy to apply without expert input may be the best default. The reason is straightforward: such a rule will reduce the cost of contracting. Let us assume that the parties to a potential waste dispute both understand the outcome that would maximize their joint welfare. Taking the *Melms* dispute as an example, let us say the optimal outcome is to tear down the mansion and level the ground as an industrial site. In order to agree contractually on this outcome, however, the parties must agree on which party must make concessions to the other and in what amount. Must the life tenant (Pabst) make a side payment to the remaindermen (the Melms children) in order to obtain their permission to make the

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145. See POSNER, *supra* note 3, § 3.11.

146. See *id.*

147. There is a large literature on contract default rules. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389 (1993).

change? Or can the life tenant proceed without the permission of the remaindermen, and perhaps even demand a contribution from them as a condition of making the change (for eliminating the cost to them of future demolition)? If the default rule is uncertain or requires extensive investigation, then it will be more difficult for the parties to reach an agreement on these issues. A simple, intuitive, self-applying rule, in contrast, is likely to make the baseline of entitlement clear to both parties, and hence will facilitate the process of reaching a contractual solution that prescribes the optimal outcome.

The commentary on the law of waste, in contrast, tends to assume that the rule should be designed not to reduce the costs of contracting, but to allow courts to reach the right outcome in litigated disputes. This would be the correct perspective if most or even a significant number of such disputes were resolved through litigation. But I have suggested that this is not in fact the case. The law of waste functions as a default rule or baseline for contracting, not as a decisional rule applied by courts—at least not very often.

Given their court-centered perspective, the commentators argue in effect that courts should adopt, as a default rule, the rule that the parties would have adopted for themselves if they had thought about the problem. This will presumably leave them better off than any other rule, and the objective of contracting is to enhance the joint welfare of the contracting parties.

One prominent suggestion along these lines, urged by John Henry Merryman, a Stanford law professor who wrote the chapter on waste for the *American Law of Property*,<sup>148</sup> would ask the following in each individual case: what would *these particular parties* have agreed upon had they thought about the matter, based on their individual wants and desires? In effect, the question in every case should be one of intention: did the tenant's actions contravene or frustrate the intentions of the parties? All the circumstances of the parties should be considered in answering this question. If no signposts of intention can be uncovered, then the parties should be presumed to have intended that the tenant would engage in reasonable conduct, in light of all the facts.<sup>149</sup>

Another approach, which also adopts a court-centered perspective, asks instead, what would *persons in general* have agreed upon in these circumstances? This is the approach urged by Judge Richard Posner in

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148. See 5 AMERICAN LAW OF PROPERTY, *supra* note 13, at v.

149. Merryman, *supra* note 13, § 20.11.

his *Economic Analysis of Law*.<sup>150</sup> Judge Posner observes that the tenant and the owner have different time horizons. The tenant will generally want to maximize the return to the property during the time the tenant is in possession; the absent owner will want to maximize the return during the time after the tenancy ends.<sup>151</sup> Posner argues that the best approach is to maximize the value of the property over both periods. This yields the largest net value, which the parties can divide among themselves as they wish.<sup>152</sup> This is also the approach, Posner says, that an economically rational owner who holds an undivided interest in the property would adopt.<sup>153</sup> The appropriate default rule for judging the actions of the tenant is thus whether the tenant has acted in the way an economically rational owner of an undivided interest in the property would have acted.<sup>154</sup> Here we see the idea that the proper measure of property is social value, measured by market prices, adopted explicitly.

Neither approach, it seems to me, is likely to be optimal if it turns out that nearly all disputes between tenants and absent owners are resolved by contract. The most basic difficulty is that both approaches are relatively expensive, because they make waste turn on something that is invisible. The parties' intentions are not readily visible to the naked eye, nor is the market value of the property. I am not saying that these things are not real. But they cannot be observed by ordinary people. They require investigation and expertise.

This means, in turn, that using either parties' intentions or economic value as a criterion for identifying waste will be relatively expensive. Merryman's intent test will often require a complicated inquiry into legal documents and personal circumstances that cannot be discerned by looking at the land. An investigation into the circumstances of the parties may be required, as well as consultation with legal experts about the proper interpretation of the terms in leases, wills, and trusts. Posner's economic-value approach is also expensive. Experts will have to testify about different uses of property and different market values for different uses.

Legal standards that require extensive fact-finding and expert advice are not always bad things. But in this context, they are misplaced. Given that disputes about tenant conduct are today overwhelmingly

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150. POSNER, *supra* note 3, § 3.11.

151. See Merryman, *supra* note 13, § 20.11.

152. POSNER, *supra* note 3, § 3.11.

153. *Id.*

154. *Id.*

resolved by contract, the default rule should be one that makes it easiest to contract. Specifically, the rule should be one that ordinary individuals can discern and apply without having to resort to legal investigation or a real-estate appraiser. Such a rule will make it much easier for the parties to understand whether they want to deviate from the default rule, and what the contract must say if they want a different result.<sup>155</sup>

Another problem associated with both the Merryman and the Posner solutions is that there will likely be considerable uncertainty about their proper application. Under Merryman's approach, it is not always clear whose intention counts. In a landlord-tenant relationship, is it just the landlord's intention, or is it also the tenant's? If the landlord assigns the reversion to another landlord, which landlord's intent counts? If the tenant assigns the lease to another tenant, which tenant's intent counts? In the life-estate context, do only intentions of the grantor count? What if a life estate is created by legal election, as in the case of the Melms estate? The root of the problem is that temporal divisions of property are not simple variations on conventional bilateral contracts. Property rights can be transferred and divided in a variety of ways, and it is far from clear that there is some unique set of intentions that attach to every decision to divide title over time.<sup>156</sup>

Posner's economic-value test suffers from a different uncertainty in application, related to picking the appropriate baseline for comparing two different states of the world. Posner's discussion presupposes that each parcel of property will have a unique value-maximizing use, and that the rational owner will always adopt this use. But there will often be uncertainties about the proper unit of time or the proper physical unit for applying the economic-value test. For example, persons often acquire property intending to hold it for future expansion or development. This may entail holding it in a suboptimal use for a significant time until the development can take place. Likewise, persons may hold multiple parcels of property, which fit together in a general scheme or plan, even though individual parcels are deployed in ways that are suboptimal from a market perspective. These uncertainties

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155. See Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14 (1985) (arguing that courts in low-transaction-cost settings should adopt rules that minimize "entitlement-determination costs").

156. Here as elsewhere in property law there is a mixture of contractual and property elements, and the intentions of the parties are often channeled into a fixed menu of property forms. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

generate even greater need for expert input and undoubtedly magnify the expense associated with the use of the test.

If disagreements about modifications of property by tenants were nearly always resolved by litigation, then I would agree that either Merryman's intent test or Posner's economic-value rule might be warranted. Such rules would be more uncertain and expensive to administer. But they would allow courts to reach judgments that would produce more satisfactory outcomes, from either an individual or a social-welfare perspective.<sup>157</sup>

The extreme infrequency of modern cases applying the doctrine of waste, however, strongly suggests that contractual solutions are the norm, not litigation. Given the ubiquity of contractual solutions to the problem, the default rule should be designed to induce the parties to address the issue by contract. Jed Purdy, in writing about this issue, has used the phrase "bargain-inducing default rule," which seems to me to capture the idea nicely.<sup>158</sup>

## VII.

If the intention test and the economic-value test are too expensive because they require expert input and are uncertain in application, then does the traditional common-law rule—forbidding material alterations in the premises—function better as a default rule in a context where contractual solutions are the norm? The answer, I think, is "Yes."

The critical facts under the traditional rule are the condition and use of the property when title is first divided, and the condition and use of the property when the tenant's custodial practices are challenged. These facts are visible to the naked eye. To determine these facts, one does not have to consult lawyers schooled in the interpretation of legal documents, or real-estate appraisers adept at assessing the market value of property. One need only examine the property itself or—in the event the property has been modified—consult architectural drawings, photographs, or evidence about its condition when title was divided.

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157. See *id.* at 852 (arguing that courts in high-transaction-cost settings should adopt rules that permit discretionary judgments maximizing the wealth of the parties).

158. PURDY, *supra* note 3, at 665. Purdy apparently understands by this term what Alan Schwartz called an "equilibrium-inducing default." Schwartz states as follows: "[A]n equilibrium-inducing default rule induces parties to choose the welfare-maximizing term. Parties respond to an equilibrium-inducing default either by accepting it or by contracting to another term. The default is correctly designed if parties accept it when it directs the efficient outcome, and contract to an efficient term otherwise." Schwartz, *supra* note 147, at 390.

We do not need to take elaborate evidence about what the parties intended when they divided the property; what most owners would have done with the property under the circumstances; what the economic value of the property was before and after the tenant modified it; whether the neighborhood has changed and, if so, whether the source of the change was independent of the tenant's actions; and so on and so forth.

Given these features, the traditional common-law rule should function well as a bargain-inducing default rule. It is simple, intuitive, and self-applying.<sup>159</sup> It sends a clear signal to the parties about their respective rights and obligations. If the parties want a different rule, they will know that they must contract for a different rule. The traditional rule will thus facilitate contractual solutions, and it will do so both *ex ante* and *ex post*.<sup>160</sup>

The traditional rule also avoids knotty questions about application that arise under either the Merryman intent rule or the Posner economic-value approach. The condition and use of the property when the property is first divided set the baseline against which future tenant behavior is measured. If the tenant materially changes the condition, the tenant has committed waste; otherwise not. The condition of the property when title is divided is a physical fact that exists with respect to every parcel of property whose title is divided. The condition when the dispute erupts is also a physical fact that exists with respect to every

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159. New York courts have enforced lease terms requiring the consent of the landlord to any alteration in the premises even in the face of plausible arguments that the tenant's modifications have enhanced the value of the property. See *Gabin v. Goldstein*, 497 N.Y.S.2d 984, 987 (Sup. Ct. 1986); *Freehold Investments v. Richstone*, 340 N.Y.S.2d 362, 364 (Sup. Ct.), *rev'd*, 346 N.Y.S.2d 718 (App. Div. 1973), *rev'd*, 311 N.E.2d 500 (N.Y. 1974). In support of this outcome, these courts, interestingly, have cited the common-law rule that any material alteration in the premises is waste, even if the value of the property is enhanced by the alteration, *Gabin*, 497 N.Y.S.2d, at 987; *Freehold Investments*, 340 N.Y.S.2d at 364—without noting that the common-law rule has been overturned in New York by statute. See *supra* notes 127–32 and accompanying text. This suggests that the “no material alteration” conception of waste has an intuitive pull that endures even in the face of the Legal Realist campaign to substitute a standard of value maximization.

160. The matter is complicated by the fact that a clear but one-sided default rule can interfere with bargaining, especially under conditions of bilateral monopoly. See Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 23–24 (1982) (noting that strategic behavior may cause bargaining to break down). But the clarity of the default rule does not always eliminate *ex post* bargaining. If the tenant wants to make a modification that will enhance the value of the property, this will generate new wealth which can be divided between the parties as part of the bargaining over whether to permit the change. A clear default rule may mean that the tenant will have to share some of the gains with the absent owner. But this does not mean that the change will not occur.

parcel whose title is divided. There are thus no conundrums about application, analogous to whose intent we consult under the Merryman test or what unit we use for valuation under the Posner approach.

Admittedly, the qualifier “material” in the common-law rule injects a bit of wiggle room. What it means, I think, is that the rule is to be applied with a view to normal owner behavior.<sup>161</sup> In other words, given the condition of the property at the time the title is divided, what actions would a normal owner take in maintaining the property in this condition? We do not ask whether a normal owner would *change* the condition of the property. We just ask what a normal owner would do in order to preserve the condition *unchanged*.

Let me offer an illustration. Some of the early common-law judges and commentators got tied up in knots trying to specify when a tenant is allowed to cut down trees.<sup>162</sup> They said that cutting down trees to profit from the timber was waste, whereas cutting down trees for necessary repairs to the estate or for fuel was not waste; and so forth.<sup>163</sup> A better understanding would be that courts should look to what constitutes normal behavior. If an agricultural tenant would normally cut some trees to repair fences and for firewood, then this would not be a material alteration. If an agricultural tenant would not normally cut trees for commercial sale, then it would be a material alteration. Most of the early cases about trees are consistent with this general understanding, whatever verbal formulations they may have adopted.

## VIII.

There is still more to be said in support of the traditional common-law rule. One can think of all sorts of clear rules that might serve as bargain-inducing default rules. “The tenant can do whatever he wants,” would be one such a rule. “The tenant must do whatever the absent owner says,” would be another. What we need is not just a bright-line default rule, but a rule that harmonizes with broader understandings

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161. Cf. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 731–32 (1973) (employing normal use, as measured by “contemporary community standards,” as a baseline in nuisance law).

162. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*281–82; 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 67 (53.a–.b) (18th ed. 1823).

163. See, e.g., Anon Y.B. 44 Edw. III, f. 44, pl. 58 (1370) (establishing an exception to waste for necessary repairs to the estate). For early American cases holding that a tenant has the right to cut firewood, see *Padelford v. Padelford*, 7 Pick. 152 (Mass. 1828); *Webster v. Webster*, 33 N.H. 18, 66 Am. Dec. 705 (1856).



about the value and function of property as an institution in our society.

The traditional common-law rule, in prohibiting the tenant from making any material alteration in the property, broadly comports with the understanding that the purpose of the institution of property is to protect the subjective expectations particular owners have in particular things. When possession is temporarily transferred, the owner is entitled to expect that what comes back is the same thing the owner had when possession was transferred. Not something else of equivalent value. The thing itself. The traditional rule is the kind of rule that we would expect to be adopted by a legal system that conceives of property as an individual right, not simply a social arrangement for maximizing wealth.

Wait a moment, you may object: if title is divided, then there are at least two people who have some stake in the thing—the absent owner and the tenant. The common-law rule protects the autonomy of the absent owner about her thing, but it does so by disregarding the interests of the tenant regarding the thing. Why adopt a rule that protects one party at the expense of the other? Why not balance their interests, or adopt some kind of approach that tries to reach an accommodation by giving weight to both interests?

Part of the answer is that we are dealing here with probabilities. The law of waste makes the judgment that the absent owner is more likely to have a strong subjective attachment to property than is the tenant temporarily in possession. This is just a generalization. For leases and life estates of relatively short duration, the generalization almost always holds true. The absent owner—the landlord or the remainderman—will have a stronger attachment to the property and a stronger claim to control its configuration and use. In other circumstances, the generalization will not hold true. A tenant under a ninety-nine-year lease will have much stronger subjective expectations about the property than the landlord holding the reversion. Note, however, that the exceptional cases are precisely those in which we would most expect to find a contract giving the tenant discretion to modify the use of the property. Any lawyer for a tenant under a very long-term lease would be guilty of malpractice if she did not attend carefully to the issue of tenant modifications. The common law, by giving the right to control to the absent owner, reaches the right result in the largest number of cases, and allows the smaller number of cases where this does not work to be handled by contract.

Another and more fundamental part of the answer is that we cannot balance interests between tenant and absent owner without abandoning

the idea of property as an individual right. If property is a right of particular persons to protect their subjective expectations about things, then property must confer sovereign-like powers on those we regard as owners. This includes the power to give possession of your property to others and expect to get it back. Maybe in other contexts, like pollution control and eminent domain, we have no choice but to switch to the idea of property as a balance of competing interests, or a social institution with outcomes measured by market values. But in the relatively simple bilateral disputes governed by waste doctrine, there is no need to introduce these complexities.

In short, waste is one area where we do not have to choose between the traditional understanding of property as an individual right and the rival conception of property as an institution for maximizing social value. We can retain the understanding of property as an individual right, and rely on the institution of contract to protect the societal interest in deploying resources to the greatest social advantage. There would seem to be little reason to abandon the idea of property as a source of protection for individual autonomy absent a strong justification for doing so. No such justification exists here.

The Wisconsin Supreme Court in *Melms* started us down the path toward a law of waste characterized by utilitarian balancing and economic valuations of competing uses of land. There was no need to do so. Captain Pabst should have been absolved of liability based on his good-faith mistake about title to the mansion. The law of waste should have been left unchanged. Had it remained unchanged, it is possible that it would remain unchanged today.